ZAINUDDIN HUSIN

v.

YUNG HENG FARM SDN BHD

HIGH COURT MALAYA, ALOR STAR
ZAINAL ADZAM ABD GHANI JC
[CIVIL APPEAL NO: 12-70-2001]
3 FEBRUARY 2004

CIVIL PROCEDURE: *Adjournment - Application for - Mere notification by defendant to plaintiff of intention to apply for adjournment - No notification or request for adjournment to court - No response by plaintiff to defendant's notification - Whether presumptuous of defendant to assume plaintiff had no objections to the adjournment - Whether proper for one party to assume adjournment would be automatically granted by court if opposing party consents to an adjournment*

CIVIL PROCEDURE: *Trial - Adjournment - Whether proper for one party to assume adjournment would be automatically granted by court if opposing party consents to an adjournment - Whether court duty bound to consider all applications for adjournment seriously*

LEGAL PROFESSION: *Professional discipline - Misconduct - Failure to make every effort to be ready for trial on hearing date - Applying for postponement of case fixed for hearing without good and cogent reasons - Whether such conduct constituted a breach of the Practice and Etiquette rules within the meaning of misconduct - Whether advocate and solicitor guilty of such misconduct liable to disciplinary proceedings*

On 27 March 2000, the appellant's counsel, applied for and obtained an adjournment. The matter was adjourned for hearing to 23 October 2000 but on that day the matter was further adjourned to 9 September 2001. On 9 September 2001, the court was again asked for an adjournment on behalf of the appellant as apparently the bundle of documents had not been received by the appellant. The respondent's counsel objected to the request. The sessions court judge adjourned the matter to the afternoon. When the case was recalled that afternoon, both the appellant and his counsel were not present. The judge then dispensed with the presence of the appellant and counsel and directed respondent's counsel to proceed with the hearing. The judge found that the respondent had established a case on a balance of probabilities and that the appellant's defence had not disclosed any defence. Judgment was thus entered

for the respondent. On appeal, the appellant *inter alia* argued that his counsel had informed the respondent's counsel by a letter dated 8 August 2001 that they intended to apply for a postponement of the hearing on 9 September 2001. They received no reply and assumed there was no objection to their proposed application, only to be informed of the respondent's counsel's objection a day before the 9 September 2001 hearing date. The appellant's counsel blamed the respondent's counsel's non-response to their letter for not appearing in court on the hearing date. The appellant further argued that the sessions court judge had erred in failing to realize that the respondent and his counsel had taken advantage of the situation and had indirect motives.

Held (dismissing the appeal with costs):

[1] The most glaring fact in the matter was that there was no mention or record of prior correspondence with the sessions court by appellant's counsel on the proposed application for adjournment. The appellant's counsel was also presumptuous on two grounds. Firstly, when the respondent's solicitors did not reply to his letter there was no reason for him to presume that the respondent's solicitors had no objection and therefore there was no need for him and the appellant to appear in court on the hearing date. Secondly, it was wrong for the appellant's counsel to assume that a request for adjournment would invariably be granted by the court if the party requesting for an adjournment had obtained prior consent of the opposing party's solicitors. (pp 236 g-h & 237 a)

[2] The authority to consider and approve an adjournment is the court concerned and not opposing counsel. The court concerned is at all times duty bound to consider all applications for adjournment seriously as such applications directly involve the management of precious judicial time. All applications for adjournment have to be considered and decided by applying the principles stated in the Federal Court case of *Lee Ah Tee v. Ong Tiow Pheng & Ors* and the Practice Directions. The Practice Directions repeatedly direct and make it abundantly clear that the request for an adjournment of a case must be made as early as possible so as to give the court concerned ample time, if an adjournment is granted, to substitute other cases for disposal. On the facts, the appellant's counsel knew from 8 August 2001 that he needed to apply for an adjournment but he did not inform the court till the very day of the hearing thus putting the sessions court into an unnecessary dilemma. (p 237 a-d)

[3] From the facts the appellant's counsel had one year and five months to obtain the necessary bundle of documents whether from the previous solicitors or from the sessions court. Nothing was done and on hearing dates 23 October 2000 and 9 September 2001, the appellant's counsel was in fact not prepared or not serious in wanting the case to proceed. This reflected a lackadaisical attitude towards his duty and responsibility as counsel having conduct of the case. The appellant's counsel conduct was absolutely unacceptable and in breach of r. 24 of the Legal Profession (Practice and Etiquette) Rules 1978, which breach is within the meaning of 'misconduct' under s. 94(3)(d) of the Legal Profession Act 1976, thereby making him liable to disciplinary proceedings before the Disciplinary Board. (p 238 c-g)

[4] On the facts, the sessions court judge had correctly exercised his discretion in not granting an adjournment on the hearing date and to proceed with the hearing of the respondent's claim without the presence of the appellant and his counsel. The judge was also correct in his finding that the respondents had, on a balance of probabilities, established their case. There was no merit in the appellant's case. (p 240 e)

Case(s) referred to:

Go Pak Hoong Tractor and Building Construction v. Syarikat Pasir Perdana [1982] 1 MLJ 77 ***(refd)***

Lee Ah Tee v. Ong Tiow Pheng & Ors [1984] 1 CLJ 26; [1984] 1 CLJ (Rep) 187 FC ***(foll)***

Tan Pak v. Chan Boon San [1992] 2 MLJ 271 ***(refd)***

Legislation referred to:

Legal Profession Act 1976, s. 94(3)(d)

Legal Profession (Practice and Etiquette) Rules 1978, r. 24

For the appellant - Mohd Satar Osman; M/s Aidah Ghani & Assoc
For the respondent - YK Loo; M/s BC Teh & Yeoh

Reported by AC Simon

JUDGMENT

Zainal Adzam Abd Ghani JC:

This is an appeal against the decision of the Sessions Court, Alor Setar made on 9 September 2001 granting judgment in favour of the respondent for the sum of RM55,753 with interest and costs. The brief facts of the case are as follows: The appellant was a client of the respondent, a company involved in poultry farming. There were some transactions between them whereby the respondent supplied poultry to the appellant and as a result the appellant owed the respondent a sum of RM55,753 (this sum was allowed to be amended by

the Sessions Court during the examination of respondent's owner from the original sum claimed of RM63,134.90). The appellant issued seven cheques for the purpose of setting the said debt but however all the seven cheques were returned to the respondent by his bank with the endorsement "Payment Stopped". The respondent issued a notice of demand dated 23 March 1998 but the appellant failed to settle the amount claimed.

For the purpose of this appeal, the relevant part of the record of proceedings starts from 27 March 2000 (case fixed for hearing) when the current counsel for the appellant came into the picture after replacing the previous solicitors by a notice dated 26 March 2000. On that date (27 March 2000) the appellant's counsel applied for an adjournment which was granted by the Sessions Court. The reason for the adjournment was not recorded by the Sessions Court judge but the next hearing date fixed was 23 October 2000. However on 23 October 2000 the case was further adjourned as the Sessions Court judge was on leave. The next hearing date given was 9 September 2001. On that date Mr. Padma who mentioned on behalf of the appellant's counsel requested for another adjournment as according to his instructions the bundle of documents was not received by the appellant. The respondent's counsel objected by stating that from their records the bundle of documents was served on 6 September 1998 and when the case came up for hearing 4 to 5 times the matter was never raised by the appellant's counsel. The respondent's counsel thereupon prayed for judgment in default be entered against the appellant, obviously pursuant to O. 28 r. 6, Subordinate Courts Rules 1980.

The learned Sessions Court judge however adjourned the case to 2.30pm as according to him the appellant's counsel was from Pulau Langkawi. However at 2.35pm when the case was recalled the appellant and his counsel failed to appear. From the record, according to the learned Sessions Court judge, the appellant had never attended court at any time even at dates fixed for hearing. The learned Sessions Court judge hence directed counsel for the respondent to proceed with the hearing, dispensing with the presence of the appellant and his counsel. After hearing the evidence of the respondent's owner and considering the documents tendered by him and the appellant's statement of defence, the learned Sessions Court judge was satisfied, on the balance of probabilities, that the respondent had established their case. He was also was satisfied that the appellant's statement of defence not only did not disclose any defence but impliedly admitted owing the sums claimed by the respondent and issuance of the seven cheques.

Through his memorandum of appeal the appellant raised several issues but they can broadly be categorized into two main issues; ie, firstly, that the learned Sessions Court judge was wrong in disallowing the appellant's application for an adjournment of the hearing and carrying on with the respondent's case without the presence of the appellant and his counsel, and secondly, that there were merits in the appellant's case which the learned Sessions Court judge failed to appreciate and consider. On the first main issue the appellant raised several grounds. Before proceeding to consider those grounds it would be useful to lay down the principles applicable to the discretion of the court faced with an application for an adjournment. Those principles can be found in the judgment of Hashim Yeop Sani FJ (as His Lordship was then) in the Federal Court case of *Lee Ah Tee v. Ong Tiow Pheng & Ors* [1984] 1 CLJ 26; [1984] 1 CLJ (Rep) 187 which reads:

> ... The discretion of the judge to allow or refuse an application for adjournment was a subject dealt with in depth by the Court of Appeal in *Dick v. Piller* [1943] 1 All ER 627. We agree to and adopt the following principles as regards the discretion in allowing or refusing an adjournment:
>
> (1) Whether or not a party should be granted an adjournment is wholly at the discretion of the judge. He would exercise the discretion solely upon his view of the facts.
>
> (2) *Prima facie* this discretion is unfettered.
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> (3) The question to ask in any particular case is whether on the facts there are adequate or sufficient reasons to refuse the adjournment.
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> (4) Although appellate court has power to interfere with the Judge's decision in regard to the granting of an adjournment, it would refrain from doing so unless it appears that such discretion has been exercised in a way which tended to that all necessary matters were not taken into consideration or the decision was otherwise arbitrarily made.
>
> (5) An appellate court ought to be very slow to interfere with the exercise of the discretion. But if it appears that the result of the order made below would be to defeat the rights of the parties altogether or that there would be an injustice to one or the other or the parties then the appellate court has power and indeed a duty to review the exercise of the discretion ...

The Federal Court in *Go Pak Hoong Tractor And Building Construction v. Syarikat Pasir Perdana* [1982] 1 MLJ 77 decided that irresponsible or a lackadisical attitude towards lawyer's duty to their client and their duty to the courts is a ground for the court to exercise its discretion to refuse an application for an adjournment. The matter of adjournment was also considered by Richard Talalla, JC in the case of *Tan Pak v. Chan Boon San* [1992] 2 MLJ 271, 376 where His Lordship had this to say:

> ... As I see it, in the face of a serious current backlog of cases, applications for adjournment without just cause, especially late applications for the same, are anathema. Every case adjourned results in one or more to the backlog of cases. Speaking for myself and this court and all the subordinate courts under the administrative jurisdiction or this court it is expected that counsel appearing in these courts will co-operate to the fullest to reduce the backlog.
>
> Judicial time is at a premium. Counsel should be sensitive to applications which make inroads into judicial time. Every consideration is given to counsel's requirements and convenience before a case is set down for hearing; for example, time to prepare the case, the marshalling of witnesses, even, when possible, counsel's extra mural commitments, social and domestic. But once a case is set down for hearing there should be no adjournment thereof except for just cause, usually emanating from circumstances beyond control ...

The issue of application for adjournment is also in fact contained in several Practice Directions and Circulars applicable also to the subordinate courts issued by the Chief Justice; and among them are Practice Direction No. 2 of 1971, Practice Direction No. 5 of 1989, Practice Direction No. 2 of 1992 and Chief Justice's Circular dated 10 April 2000 (replaced by Chief Justice's Circular No. 1/2003). All these reflect the serious concern and consideration given on the matter by the judiciary.

On this main issue the appellant argued that his counsel informed the respondent's counsel by a letter dated 8 August 2001 that they intended to apply for a postponement of the hearing on 9 September 2001 as the appellant and his counsel will not be in Alor Setar on that date. Since they received no reply they accordingly assumed that the respondent's solicitors had no objection to their applications. They only realized the objection one day before the hearing date on 9 September 2001 when a clerk from the appellant's counsel's firm phoned the appellant's solicitor's office. The appellant's counsel blamed the respondent's counsel non-response to their letter for them not appearing in court at the hearing date. The appellant asserted that the learned Sessions Court judge had erred in not giving due consideration to those circumstances and as such failed to realize that the respondent and his counsel had taken advantage of the situation and had indirect motives. The most glaring fact on this matter is that there was no mention or record of any prior correspondence with the Sessions Court by the appellant's counsel on the proposed application for adjournment. The appellant's counsel was accordingly, under the circumstances, presumptuous on two counts. Firstly, when the respondent's solicitors did not reply to their letter there was no reason for him to presume that the respondent's solicitors had no objection and therefore there was no need for him and the appellant to appear in court at the hearing date. Secondly, it was wrong for

the appellant's counsel to assume that request for adjournment of a hearing will invariably be granted by the court if the party requesting for an adjournment had obtained the prior consent of the opposing party's solicitors.

The appellant's counsel should be reminded that the authority to consider and approve an adjournment is the court concerned and not the opposing counsel. The court concerned is at all times duty bound to consider all applications for adjournment seriously as such applications directly involve the management of precious judicial time. All applications for adjournment will have to be therefore considered and decided by applying the principles as stated earlier by the Federal Court in the case of *Lee Ah Tee v. Ong Tiow Pheng* and the Practice Directions. The Practice Directions repeatedly direct and make it abundantly clear that request for adjournment of a case must be made as early as possible so as to give the court concerned ample time, if an adjournment is granted, to substitute other cases for disposal on the date or dates vacated (see: Practice Direction No. 2 of 1971, para. 4; Practice Directions No. 5 of 1989, para. 3(a)(iv)); and Chief Justice's Circular dated 10 April 2000, para. 5). The appellant's counsel knew from 8 August 2000 that they needed to apply for an adjournment but did not inform court till the very day of the hearing, thus putting the Sessions Court into an unnecessary dilemma.

The other ground submitted by the appellant on the main issue was that his counsel did not have in their possession the necessary bundle of documents when they took over the conduct of the case from the appellant's previous solicitors. In para. 2 of his memorandum of appeal the appellant averred, *inter alia*, that his counsel realized that the bundle of documents was not in his possession one day before the hearing date (9 September 2001) and as such instructed the counsel mentioning on his counsel's behalf to request for a short mention date to enable his counsel to obtain the bundle from the previous solicitors or to apply for a certified copy of one from the Sessions Courts. The appellant thus argued that the learned Session Court judge erred in not considering those circumstances when he directed that the respondent to proceed with his case and subsequently entering judgment without the appellant and his counsel's presence in court. On a close examination of the Appeal Record and the written submission by the appellant's counsel, I find that the statements in the written submission, ie "... Selepas tarikh 27 haribulan Mac 2000, peguam perayu/ defendan yang baru telah memohon penangguhan memandangkan tiada sebarang dokumen pada peguam. Mahkamah selepas itu menetapkan tarikh bicara yang baru pada 23 Oktober 2000 ...", directly contradict the appellant's averment that his counsel realized it only one day before the hearing date.

Apart from that apparent contradiction, one obvious inference is inevitable, it is that from the time the appellant counsel took over the conduct of the case (ie, on 26 March 2000) till the actual date the case proceeded to hearing (ie, 9 September 2001), the appellant's counsel did nothing to prepare the case for the purpose of the hearing, at least in terms of getting the necessary bundle of documents. When the appellant's counsel first appeared for the case at the Sessions Court, ie, on 27 March 2000 the appellant's counsel asked for an adjournment and in the written submission before me, as mentioned earlier, the reason then was because there were no documents relating to the case in her possession. In allowing that application the Session Court postponed the hearing date to 23 October 2000, that is a good seven months later. As stated earlier the hearing date on 23 October 2000 was vacated and the hearing was further adjourned to 9 September 2001, another 10 months. So all in all the appellant's counsel had one year five months to obtain the necessary bundle of documents, whether from the previous solicitors or from the Sessions Court. Quite clearly nothing was done and as such on the hearing dates of 23 October 2000 and 9 September 2001 respectively, the appellant's counsel was actually not prepared or not serious in wanting the case to proceed to hearing. That clearly reflects a lackadaisical attitude towards his duty and responsibility as counsel having conduct of the case. With that background, it is totally inappropriate for the appellant to attribute blame for the non-adjournment of the hearing to the respondent's counsel and the learned Sessions Court judge for not appreciating the appellant counsel's so-called predicament. As an officer of the court, the appellant's counsel's conduct is absolutely unacceptable and in breach of r. 24 of the Legal Profession (Practice and Etiquette) Rules 1978 which provides:

> (a) An advocate and solicitor shall make every effort to be ready for trial on the day fixed.
>
> (b) An advocate and solicitor may apply for postponement of a case fixed for hearing for good and cogent reasons only ...

That breach is within the meaning of "misconduct" under s. 94(3)(d) of the Legal Profession Act 1976, thereby making him liable to disciplinary proceedings before the Disciplinary Board.

The learned Sessions Court judge in his grounds of judgment gave two reasons for his refusal to grant further adjournment, ie, that the case was previously adjourned five times and that the appellant was never present although hearing dates were fixed. However, from my perusal of the Appeal Record there were other grounds, as mentioned by me, sufficient to justify and support the learned Session Court judge refusal to grant the adjournment and to direct the

respondent to proceed to proof his case without the presence of the appellant and his counsel. His decision on this matter, in the circumstances of the case, clearly satisfied the principles as laid down by the Federal Court in *Lee Ah Tee v. Ong Tion Pheng & Ors.* and *Go Pak Hoong Tractor And Building Construction v. Syarikat Pasir Perdana* together with the Practice Directions. There is therefore no justification for me to review the exercise of discretion by the learned Sessions Court judge.

On the second main issue, the appellant raised a few grounds. The first was the police report lodged by him on 31 March 2001. By the police report, the appellant alleged that, *inter alia*, the mode of payment for the poultry was clarified by the appellant to the respondent, ie, that the respondent should inform the appellant before cashing the cheques and as such the respondent was unable to cash the cheques as the appellant was not informed prior to the cashing as agreed. In para. 7 of his memorandum of appeal, the appellant stated that the reason was to enable him to recoup money from his own clients before the appellant can cash his cheques. The police report was never mentioned in the appellant's statement of defence. In any event, the police report was obviously an after-thought as it was lodged after the respondent issued the notice of demand on 23 March 2001. Furthermore, the mode of payment as claimed by the appellant in my opinion cannot be true from the very circumstances of the events as transpired in the case itself. When the respondent served a notice of demand upon the seven cheques being returned by the bank, the appellant himself did not exactly respond in a manner as he claimed to be the agreed mode of payment. He could have easily issued seven new post-dated cheques to the respondent with clear instruction when to cash them to enable him ample time to recoup the necessary money from his clients. Instead he responded by lodging the police report stating precisely the thing that he himself did not follow or implement. The appellant's police report which presumably was to give credibility to his claim was thus actually contradicted by his own conduct.

The appellant then complained that the learned Session Court judge did not give due consideration that, as recorded on 16 January 1999, there was an application by the appellant to settle the claim out-of-court and as a consideration the respondent should continue to supply poultry. I am at a loss to understand this ground. What is clear is that until the date of hearing ie, on 9 September 2001 there was no settlement of the respondent's claim by the appellant. The respondent of course has a right to stop supplying poultry to the appellant and cut his losses when outstanding debts were not settled by the appellant. So there was no reason for the Sessions Court to consider the failed attempt at settlement.

Finally, the appellant averred that the learned Sessions Court judge erred in his assessment of the documentary evidence before the court as those documents supported the appellant's case when making his decision. The learned judge's brief grounds of judgment considered, *inter alia*, the appellant's statement of defence and concluded that in the statement of defence itself, the appellant impliedly admitted owing the respondent the claimed sum and that he actually issued the seven cheques which subsequently was dishonored being payment for the same. This finding is correct as the appellant, actually explicitly not impliedly, admitted ordering poultry from the respondent (para. 3 of the statement of defence). The appellant also clearly admitted owing the sum claimed and issuing the seven cheques (in para. 4 of his statement of defence) but disputed as to the mode of payment. I have dealt with the mode of payment earlier. It is noteworthy also that Ringgit Malaysia figures of the seven dishonored cheques tallied exactly with the 7 Ringgit Malaysia "Debit" figures in the statement of account showing the appellant's debt tendered by the respondent in evidence. All these corroborated the documents tendered on behalf of the respondent at the hearing. The objection on the Sessions Court's assessment of the documentary evidence by the appellant is thus devoid of any merit.

Based on all the aforesaid reasons, I am satisfied that the learned Sessions Court judge correctly exercised his discretion in not granting an adjournment on the hearing date and to proceed with the hearing of the respondent's claim without the presence of the appellant and his counsel. The learned Sessions Court judge was also correct in his finding that the respondent did, on the balance of probabilities, established their case. It is also my considered opinion that there is no merit in the appellant's case. This appeal is therefore dismissed with costs.